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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/814,035	04/01/2004	Stephen Bennett Elliott	1119-005	6285
27820	7590	08/10/2007	EXAMINER	
WITHROW & TERRANOVA, P.L.L.C.			MALAMUD, DEBORAH LESLIE	
100 REGENCY FOREST DRIVE			ART UNIT	PAPER NUMBER
SUITE 160			3766	
CARY, NC 27518			MAIL DATE	DELIVERY MODE
			08/10/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/814,035	ELLIOTT, STEPHEN BENNETT
	Examiner	Art Unit
	Deborah Malamud	3766

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 17 May 2007.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1, 11, 13 and 17-40 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1, 11, 13, 17-35 and 40 is/are rejected.  
 7) Claim(s) 36-39 is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on 01 April 2004 is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | Paper No(s)/Mail Date: _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 5) <input type="checkbox"/> Notice of Informal Patent Application |
|  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

1. The examiner acknowledges the amendments received 17 May 2007. New claims 39-40 are added; claims 1, 11, 13 and 17-40 are pending.

### ***Claim Objections***

2. In view of the amendments received 17 May 2007, the objection to claim 36 is withdrawn.

### ***Response to Arguments***

3. Applicant's arguments filed 17 May 2007 have been fully considered but they are not persuasive. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). For example, the applicant argues (pages 9-10, "Remarks") "the Vaschillo reference [previously cited] does not dispense a therapeutic gas to the person during the inhalation phase of the breathing cycle and does not dispense therapeutic gas based on heart rate variability," and "there is no teaching within the Krebs reference [previously cited] of coordinating breathing, and thus the application of therapeutic gas, with the heart rate variability cycle for purposes of respiratory therapy," and "the Krebs reference monitors heart rate only to determine whether the application of gas to the patient is excessive to prevent side effects and

provides no teaching of how to determine whether the application of gas is excessive based on heart rate." The examiner would like to note that the absence of these features was addressed in the previous Non-Final Office Action, and the combination of Vaschillo and Krebs was explained therein.

***Claim Rejections - 35 USC § 103***

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
5. Claims 1, 11, 13, 17, 21-35 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vaschillo et al (U.S. 5,997,482) in view of Krebs (U.S. 2002/0185126). For a complete discussion of the claim elements, please see above and the previous Non-Final Office Action.
6. Regarding new claim 40, It has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138. Since Vaschillo in view of Krebs discloses a therapeutic gas dispenser, a care recipient indicator, a heartbeat detector, and a heart rate variability monitor, as discussed above, Vaschillo in view of Krebs is considered to be adapted to, and capable of, being used in the claimed manner.
7. Claims 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vaschillo et al (U.S. 5,997,482) in view of Krebs (U.S. 2002/0185126) and in further

view of Lutchen et al (U.S. 6,435,182). For a complete discussion of the claim elements, please see above and the previous Non-Final Office Action.

***Allowable Subject Matter***

8. Claims 36-39 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Conclusion***

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah Malamud whose telephone number is (571) 272-2106. The examiner can normally be reached on Monday-Friday, 9.00am-5.30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Angela D. Sykes can be reached on (571) 272-4955. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

*Carl H. Layno*  
CARL LAYNO  
PRIMARY EXAMINER

*Deborah L. Malamud*  
Deborah L. Malamud  
Patent Examiner  
Art Unit 3766